

**To:** Fugh, Justina[Fugh.Justina@epa.gov]; Schwab, Justin[schwab.justin@epa.gov]; Fotouhi, David[fotouhi.david@epa.gov]  
**Cc:** Minoli, Kevin[Minoli.Kevin@epa.gov]; Zenick, Elliott[Zenick.Elliott@epa.gov]  
**From:** Schmidt, Lorie  
**Sent:** Wed 5/17/2017 3:54:40 PM  
**Subject:** Re: CPP and effect of recusals

Justin and David,

The CPP OGC team was having difficulty figuring out what we could say to whom about the CPP litigation as part of the CPP rulemaking.

We raised it with Justina and Kevin to get their guidance, which I memorialized in the first email below. Justina's email confirms my understanding.

I think this advice will make communication easier on the CPP rulemaking.

I thought it would be helpful for all of us to have the same understanding on this. Hope you find this helpful.

Lorie

Sent from my iPhone

On May 16, 2017, at 6:17 PM, Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)> wrote:

Hi Lorie,

With respect to the CPP litigation, yes, both Justin Schwab and Scott Pruitt are recused from participating in the litigation. Because the former client for both of them is a state government, neither is otherwise restricted by the Trump ethics pledge, but they are both restricted by the one year "cooling off" period set forth in the impartiality provisions at 5 CFR 2635.502(b). In addition, Administrator Pruitt has bar restrictions under rule 1.6 (confidentiality of information) and rule 1.11 (former government lawyer), while Justin has bar restrictions under rule 1.6 and 1.9 (duty to former client). To avoid even the appearance of a conflicts issue, OGC/Ethics has advised both the Administrator and Justin to recuse from the CPP litigation for the duration of their EPA service.

Their recusal, to be clear, is directed at the litigation itself. They cannot participate in any work, decisions, recommendations or briefings associated with the litigation. But their restriction does not extend to rulemaking or to what the Agency may write in its Federal Register notice, for example. I used the analogy of a horse that has a cart harnessed to it. If the rulemaking is the horse, then the Administrator can certainly direct the horse to go in any direction he wants. That the cart (which is the litigation)

follows the horse does not necessarily mean that the Administrator is directing the cart. He can't tell you what to put on the cart, or to reload the cart, or to take things off the cart, but he can direct the rulemaking even though the cart may follow along behind.

I said that you all could inform the Administrator that his policy decisions (Chevron Step 1 versus Chevron Step 2) may have ramifications upon the litigation, but that his decision about leading that policy horse would not mean he is participating directly in the litigation itself. He can be informed about what you speculate may be litigation outcomes as a result of his policy choices, but his decisions about *policy* direction will not mean that he is participating in the litigation. As you say, neither he nor Justin can provide you with any direction on what you file with the court in the pending litigation nor direct your litigation strategy.

So, yes, I think you've understood what we discussed yesterday.

Justina

Justina Fugh | Senior Counsel for Ethics | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

-----Original Message-----

From: Schmidt, Lorie

Sent: Tuesday, May 16, 2017 10:46 AM

To: Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>; Minoli, Kevin <[Minoli.Kevin@epa.gov](mailto:Minoli.Kevin@epa.gov)>

Cc: Zenick, Elliott <[Zenick.Elliott@epa.gov](mailto:Zenick.Elliott@epa.gov)>

Subject: CPP and effect of recusals

Justina and Kevin,

I wanted to confirm that I am understanding how the Administrator's and Justin Schwab's

recusals from the pending litigation on the Clean Power Plan (CPP) interact with their ability to work on rulemakings related to the Clean Power Plan.

Both are recused from the pending CPP litigation; neither are recused from rulemakings related to the CPP.

Both can be informed of how policy decisions in the rulemaking would affect the CPP litigation, and it is permissible in the context of making decisions or providing directions in the rulemakings for them to take account of how those decisions or directions would affect the litigation.

**Ex. 5 - Deliberative Process**

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They should

not, however, be providing us any direction on what we file with the court in the pending litigation or directing our litigation strategy.

Please let me know if my understanding is inaccurate.

Thank you for your time sorting this out.

Lorie

Lorie Schmidt

Associate General Counsel, Air and Radiation Office of General Counsel US Environmental Protection Agency

(202)564-1681

Sent from my iPhone